

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY JERROD BROWN II,

Defendant-Appellant.

UNPUBLISHED

September 15, 2011

No. 298860

Wayne Circuit Court

LC No. 09-019681-FH

Before: SAWYER, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial convictions of felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and assault and battery, MCL 750.81. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to seven months to 120 months' imprisonment for the felon in possession conviction, two years' imprisonment for the felony-firearm conviction, and 90 days' imprisonment for the assault conviction. Because defendant was not denied a fair trial when the prosecutor questioned his mother, Lillian Brown, and, because the trial court did not fail to recognize its sentencing discretion over the maximum habitual offender penalty, we affirm.

Defendant first argues that he was denied a fair trial when the prosecutor improperly questioned witness Lillian Brown regarding why she did not go to the police earlier with the information she testified to at trial. Defendant further argues that he was denied the effective assistance of counsel for his counsel's failure to object to the questioning. Defendant failed to preserve the issue for appellate review because he did not object to the prosecution's questioning of the witness. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Thus, while claims of prosecutorial misconduct are generally reviewed de novo to determine whether defendant was denied a fair trial, *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005), this Court's review of this unpreserved issue is for plain error affecting defendant's substantial rights, requiring defendant to show that (1) an error occurred; (2) the error was plain; and (3) the plain error was outcome determinative. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In *People v Emery*, 150 Mich App 657; 389 NW2d 472 (1986), this Court held that "[a] prosecutor may cross-examine a non-alibi defense witness regarding his failure to come forward prior to trial with the information testified to at trial if the information is of such a nature that the

witness would have a natural tendency to come forward with the information prior to trial.” *Id.* at 666. In determining whether a witness would have a “natural tendency” to come forward with information, the following several factors should be considered: (1) whether the witness and the defendant had a close relationship such that it was reasonable to believe that the witness would have exerted some effort to provide the police with information that may exculpate the defendant; (2) whether the witness was present during the crime and, therefore, possessed personal knowledge of what occurred; (3) whether the witness’s presence implicated the witness in the crime; and, (4) whether the witness had to take the initiative to speak with police. *Id.* at 666-667.

All of the *Emery* factors are present in this case. Lillian Brown is defendant’s mother. Not only are they mother and son, but they also live together in the same home. It is logical to assume that Lillian would have exerted some effort to provide police with information that would exculpate defendant. Lillian was also present when the incident occurred. In fact, even by her own account, she was an active participant and surely possessed personal knowledge of what occurred. Lillian’s presence at the scene also implicated her. Her ex-husband had been shot. Information that the ex-husband, and not defendant, was the aggressor would have served to not only exonerate defendant, but Lillian as well. Finally, Lillian did not have to take any initiative to speak with police because police were on the scene immediately following the shooting. It is clear, therefore, that the prosecution acted properly in questioning Lillian regarding her failure to tell police what actually happened at the scene. The prosecutor was not attacking Lillian’s citizenship but was simply pointing out the ludicrous nature of her testimony. If Lillian’s testimony that defendant never possessed a gun on that night was believed, then she allowed her son to be arrested for a crime he did not commit. It is obvious, therefore, that the prosecution properly questioned a non-alibi witness regarding her failure to come forward earlier with the information she testified to where she clearly had a “natural tendency” to come forward with the information. Because there was no wrongdoing on the prosecutor’s part, defense counsel was not required to raise a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

We further point out for argument’s sake that even if the prosecutor’s questioning was improper, the result of the trial would not have been different. Cathy Mandas testified that she heard what sounded like a gunshot and looked out her window where she saw a man and a woman wrestling. On opening the door, she could hear the woman shouting, “please don’t kill me, please don’t shoot me.” Both individuals had their hands in front of them and were holding on to something and pushing it away, so it was not pointing at either of them. Cathy’s daughter, Catherine Mandas, likewise testified that she saw two people wrestling on the porch. When the front door was opened, Catherine could hear a female voice shouting, “please don’t kill me, please don’t hurt me, please don’t shoot me.” The two individuals had their hands clasped together out in front of them while they struggled and Catherine concluded that they were probably holding a gun. Catherine saw the man pistol whip the woman approximately five times.

Stephanie Kyriakou testified that she was smoking a cigarette on her porch when she heard yelling from down the street. She saw a man and a woman arguing on the front porch of their condominium. The woman was telling the man to leave and was pushing him backward.

The man pushed her back. Kyriakou made the decision to call the police, but before she could do so she heard a gunshot.

Northville Township Police Officer Kristen Ciccotelli saw two people struggling on the porch—a male and a female. The female was holding the male up against the brick wall. The male was facing her and was “holding a gun in his right hand and the female with her back towards me was holding on to his wrist shaking it violently.” A few seconds passed, and the female “removed the weapon from his right hand with her left hand and tossed it over the porch.” Ciccotelli identified defendant as the male. Officer Caroline Czelada also identified defendant as the man struggling with Lillian on the porch. Czelada placed Lillian in handcuffs and noted that Lillian’s hair was matted with blood.

Lillian’s testimony was not believable and clearly biased. Though she claimed her ex-husband was the aggressor, her testimony failed to explain why she and defendant continued to struggle with the gun on the front porch long after her ex-husband had been shot and disarmed. She also downplayed her injuries, calling them “superficial,” when, in fact, her hair was matted with blood and she was taken to the emergency room where she received several stitches. She offered no explanation regarding how she received those injuries other than being pistol whipped by defendant. The evidence was overwhelming that defendant had a gun in his possession that night.

Defendant next argues that he is entitled to resentencing where the sentencing court failed to recognize its discretion in imposing an enhanced sentence. The trial court originally sentenced defendant to a term of seven months to five years’ imprisonment for the felon in possession of a firearm conviction. According to defendant, it was only after the prosecutor advised the trial court that the maximum penalty was required to be ten years that the trial court withdrew the original sentence and sentenced defendant to a term of seven months to ten years’ imprisonment. Defendant contends that the sentencing court erroneously believed that sentencing pursuant to an habitual offender conviction was discretionary, not mandatory. Defendant failed to preserve the issue for appellate review because he did not object at sentencing. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). As such, we review for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

Pursuant to MCL 769.11(1)(a), a sentencing court has discretion in deciding whether to enhance an habitual offender’s sentence. This Court has stated that “there is no legal requirement that a trial court state on the record that it understands it has discretion and is utilizing that discretion. Rather, absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law must prevail.” *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001) (citations omitted). The prosecutor did not tell the trial court that an enhanced sentence was mandatory; rather, the prosecutor was correcting an error on the PSIR. Similarly, the trial court did not imply that it lacked discretion in enhancing defendant’s sentence; rather, it simply corrected the sentence based on the most current information. Because the record does not clearly reveal that the sentencing court erroneously believed it lacked discretion in enhancing defendant’s sentence, defendant is not entitled to be resentenced.

Affirmed.

/s/ David H. Sawyer

/s/ Pat M. Donofrio

/s/ Amy Ronayne Krause